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ABSTRACT

This paper deals with the development of the right of publicity since "Zacchini v Scripps-Howard," a case in which the Supreme Court ruled in favor of Hugo Zacchini, a "human cannonball" who had charged that his professional property had been unlawfully appropriated by a television station that had filmed and shown his performance without permission, and against the station, which had claimed protection under the First Amendment. The paper first looks at the development of the right prior to the Supreme Court ruling, then at the case itself, and finally at recent cases centering on the right of publicity. The concluding section offers guidelines for deciding future right-of-publicity cases based on copyright's fair use doctrine. (FL)

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Development of the Right of Publicity Since Zacchini v. Scripps-Howard

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Hugo Zacchini, "the human cannonball," wasn't thinking about legal history[1] as he slipped into the mouth of his cannon at Ohio's Geauga County Fair on that August day in 1972. He was thinking about his net 200 feet away.[2]

It took Zacchini fifteen seconds to land in that net and just that long for a cameraman from WEWS in Cleveland to film Zacchini's act against his wishes and for WEWS viewers to watch it later on the 11 o'clock news. It then took Zacchini five years and three court battles before his claim of unlawful appropriation of his professional property reached the U.S. Supreme Court. The Court held that the First and Fourteenth Amendments do not immunize the media from a suit for compensation brought under a state-created right of publicity when they act without consent of the claimant.[3] This right of publicity based on an individual's right to be free from appropriation of his name or likeness by another for the other's financial benefit represents the first effort by the Court to reconcile an individual's private right to profit from his personality with the need of the public to be informed about that personality.[4] As the right has been recognized by a growing number of jurisdictions,[5]

one scholar sees it as signaling "a dramatic reduction in press freedom,"[6] and others have agreed with that assessment.[7]

This article reviews development of the right of publicity since Zacchini v. Scripps-Howard. It looks first at development of the right prior to Zacchini, then at the case itself and finally at recent cases centering on the right. Guidelines for deciding future right of publicity cases based on copyright's fair use doctrine are suggested in the conclusion.

Development of the Right of Publicity

The right of publicity stems from the right of privacy first articulated by Samuel Warren and Louis Brandeis in an 1890 article which described privacy as the right to be let alone and distinguished it from libel and slander on the basis of a spiritual-material dichotomy.[8] The late William Prosser, one of the leading experts on the right of privacy, later discussed the right in terms of four separate invasions: intrusion into physical solitude, publication of private matters, false light and appropriation of some element of the plaintiff's personality--name or likeness--for commercial use.[9] It is under the latter category of misappropriation that the right of publicity has developed, and that category involves a critical distinction from the other three: misappropriation can involve not only the right to be let alone but the right to be paid for being bothered.[10] The last is often the case when a celebrity's personality is appropriated.

The tort of appropriation first received nationwide attention when the Georgia Supreme Court in 1905 acknowledged a common law right of the individual to control commercial use of his picture.[11] The right was subsequently recognized by most states either at

common law or by statute, the difference being that those states with statutes require appropriation for commercial purposes.[12] Early cases tended to mix the right to be let alone and the right to be compensated for pecuniary loss. Although financial loss was central to most suits, some were brought on the basis of injury to feeling rather than the pocketbook. Cary Grant, for example, was not interested in compensation for Esquire's use of his picture with new clothing styles; he simply found the magazine's placing his head on the latest fashions offensive.[13] While courts, in addition to recognizing claims such as Grant's, did recognize a need to protect a celebrity's economic value in publicizing himself,[14] they tended to be so entrenched in the Grant mold of "hurt feelings" as a basis of recovery that many celebrities were denied protection.[15] As long as courts tended to classify appropriation as usurpation of privacy instead of as a proprietary interest, celebrities tended to lose cases because they were deemed public figures who had asked for press coverage and could not legally complain about it when it occurred.[16]

The phrase "right of publicity" was first coined in 1953 in a case which upheld a baseball player's assigning his right of publicity to a company which manufactured chewing gum cards.[17] The rationale underlying the decision was that a person who has invested years of practice, effort or competition in a public personality should have the exclusive private right to realize the monetary profits from its marketable status. The right was later extended to include not only a person's name and likeness but reputation and accomplishments.[18] In yet another significant extension of the right of publicity, New York and California

courts distinguished it from privacy and held that since the right of publicity is a property right, it descended to the widows of Stan Laurel and Oliver Hardy[19] and to the heirs of Bella Lugosi, although the latter decision was eventually overturned because Lugosi had not exercised the right himself.[20] In addition to expansion of the right of publicity, courts recognized other similar theories of recovery sought by plaintiffs, including unjust enrichment[21] and unfair competition.[22]

At the same time that the right of publicity was expanding, however, so was development of newsworthiness as a defense for media defendants. Immunity to prosecution for commercial exploitation based on a legitimate news interest was recognized in cases in which the First Amendment barred successful suits by Pat Paulsen, Frank Man and Elvis Presley.

First Amendment claims defeated Paulsen's suit against manufacturers of his campaign poster which consisted of his picture and a caption: "FOR PRESIDENT."[23] A New York Superior Court said that despite the obviously commercial motive behind the posters, they constituted political commentary on his 1968 mock presidential campaign. The question of where to draw the line between the right of the public to know and an act of appropriation came up again when Man's rendition of "mess call" on his flugelhorn before 400,000 spectators at Woodstock was filmed for a commercial motion picture.[24] Even though once again the appropriation was for commercial purposes, a United States District Court said that Man had voluntarily placed himself in the spotlight and that the movie was no more than a factual depiction of events of public interest and, therefore, newsworthy. When Elvis Presley two years later sued a record company which included an interview with him on a "talking magazine," the same New York

Superior Court that heard Paulsen's case found that Presley was not entitled to relief because the record disseminated information of public interest.[25]

Added to these cases were two which upheld the use of photographs of Shirley Booth and Joe Namath by Holiday and Sports Illustrated respectively in advertisements for those magazines.[26] The New York Supreme Court in both instances said the magazines' use of the pictures in ads meant to illustrate the quality and content of their publications was protected because the pictures were originally published as news.

What one scholar has called a period represented by "extreme interpretations of press interest,"[27] however, was soon to be somewhat undercut by Zacchini. In that case, the defense of newsworthiness claimed successfully in the cases cited previously failed.

Zacchini v. Scripps-Howard

Hugo Zacchini was preparing to perform his act as a human cannonball on August 30, 1972, at an Ohio county fair twenty miles from Cleveland. A cameraman from Cleveland's WEWS-TV asked for permission to film his show, but Zacchini refused. The cameraman left and Zacchini performed the act which he says was invented by his father and which has been performed only by his family for the past fifty years.[28] On the following day, the cameraman returned to the fenced area surrounded by grandstands in which Zacchini performed for fair crowds at no extra charge over gate admission. The act was filmed and shown as part of the station's 11 o'clock newscast that evening. Commentary that

accompanied broadcast of the fifteen-second performance referred to "the great Zacchini" and concluded by saying that the act "is a thriller. . . and you really need to see it in person. . . to appreciate it."[29]

Zacchini first filed a $25,000 suit for unlawful appropriation of his professional property in July of the following year. Scripps-Howard claimed First Amendment protection for the broadcast, and the Cuyahoga County trial court found in favor of the station. Zacchini then appealed to the Ohio Eighth District Court of Appeals which reversed the lower court on the basis of conversion and common law copyright.[30] Such a performance, the Court said, is the product of the actor's talent and is his property and, as such, it involves a property right entitled to the same protection under the common law as any other property right.[31] In response to the defendant's First Amendment contentions, the Court said that the Amendment "provides no defense to the taking of private property against the owner's explicit denial of permission."[32]

On appeal, the Ohio Supreme Court refused to sever rights of publicity and privacy, saying that Zacchini wanted to keep the benefits of his performance private.[33] The Court said that a common law right of publicity existed but that an actual malice standard as applied in Time, Inc. v. Hill[34] to false light invasion of privacy also would apply in cases such as this one.[35]

> No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the 'breathing room' in reporting which freedom of the press

> requires. The proper standard must necessarily be whether the matters reported were of public interest.[36]

Just as the press was privileged to cover matters of legitimate public interest which might otherwise be considered private on the basis of Time, Inc. v. Hill, the press also was privileged, the Court said, to cover an individual publicly seeking to exploit his talents while keeping the benefits private. The act was broadcast as news, and the privilege would be lost only if the station's intent was not to report the performance but to appropriate it for private use or to injure the performer.[37]

The Supreme Court on June 28, 1977, reversed the Ohio Supreme Court's finding, saying that a performer's interest in his act is protected under a right of publicity which can be analogized to copyright and patent law.[38] Just as copyright protects expression, so does the right of publicity protect a performer's proprietary interest in his work but not discussion of it. Thus, while talking about the act is protected by the First Amendment, showing the performance as a whole is not. The Court said it could not state exactly where the line between what can and cannot be reported is drawn in every case, but "we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent."[39] This protection, the Court said, provides an economic incentive for Zacchini to make the investment required to produce a performance of interest to the public and allows him to reap the value of it and to make a living.[40]

The Supreme Court specifically rejected the State Supreme Court's categorization of the case as a privacy suit. Privacy

actions protect reputation, not proprietary interests, the Court said, and the Hill actual malice test, therefore, is inapplicable. The two torts also differ, the Court pointed out, in the degree to which they intrude on dissemination of information to the public. In false light privacy actions such as Hill, the defendant wants to minimize publicity, while in right of publicity cases such as Zacchini, the question is merely one of who gets to do the publicizing.[41] The Court concluded that Ohio may as a matter of its own law privilege the press but that the state is not constitutionally required to do so.[42] In other words, a state may decide that an individual's right of publicity sometimes outweighs freedom of the press, and if that individual can prove injury on the basis of publication, the state may award damages.[43]

In dissent, Justice Lewis Powell joined by two other justices said that the media's First Amendment privilege should not be based on appropriating an entire act but on the use the station makes of the act: if the act was used as part of a newscast it would be protected, but if private or commercial exploitation was involved, it would not be.[44]

Aftermath of Zacchini

Development of the Right of Publicity in Recent Cases

Dire predictions of chilling effects on the media stemming from resolution of Zacchini began immediately with the dissenting opinion in the case. The majority was criticized for failing to be "appropriately sensitive to the First Amendment values at stake."[45]

> Hereafter, whenever a television news editor is unsure whether certain film footage received from a camera crew might be held to portray an 'entire act,' he may decline

> coverage--even if clearly newsworthy. . . or confine the broadcast to watered-down verbal reporting, perhaps with an occasional still picture. The public is then the loser. This is hardly the kind of news reportage that the First Amendment is meant to foster.[46]

Among specific questions raised by scholars critical of the decision were: What constitutes an entire act? Could the problem be circumvented by rolling cameras just after an act started? How would acts within acts be treated? How would radio and the print media be affected since they cannot indicate mannerisms and delivery as television can? What constitutes implied consent? And how would damages be calculated?[47]

Some of these questions have amounted to the proverbial tempest in a teapot since no performer after Zacchini has sued based on appropriation of an entire act. It would be difficult to determine if editors across the country have experienced the so-called chilling effect of Zacchini in their day-to-day editorial decision-making. But court records, on the other hand, show that plaintiffs have not flocked to court with appropriation complaints based on right of publicity. One judge, in fact, has made reference to the "paucity" of decisions in this area.[48]

Yet even though entire act litigation has been noticeably absent, the right of publicity in general and the defense of newsworthiness in particular have been further defined in recent cases. The existence of the right and its assignability and descendibility have been strengthened significantly. In addition, First Amendment claims of movies and books have been favored over plaintiffs' right of publicity in a few cases, while in others, media defendants have lost out to the right of publicity based on

findings that the subjects at hand were not newsworthy.

In cases reiterating the right of publicity, plaintiffs representing the interests of Elvis Presley and Agatha Christie have been instrumental. In the first instance, a United States District Court determined in Factors, Etc. v. Creative Card Co.[49] that Presley's right of publicity which was clearly exercized by him during his lifetime and which was financially beneficial to him constitutes a recognizable property right assignable by him which survives his death. The Court traced the management of "the commercial exploitation of Elvis Presley" during his lifetime by Colonel Tom Parker and a series of agreements made which ended with plaintiff Factors, Etc. being given an exclusive license to use Presley's likeness in connection with all souvenir merchandise.[50] The Court said:

> There is no reason why the valuable right of publicity--clearly exercized by and financially benefiting Elvis Presley in life--should not descend at death like any other intangible property right.[51]

In a similar case brought eight months later by the same plaintiff, the Second Circuit United State Court of Appeals said that to hold that the right did not survive Presley's death would be tantamount to granting a windfall in profits to the defendants, at the same time making Factors' exclusive rights "virtually worthless."[52] Another United States District Court decision granted an injunction against distribution of Elvis Presley statues even though the venture was nonprofit. The Court said Factors, Etc. also marketed three statues, emphasizing Zacchini's stress on the right to profit from one's work.[53] In these cases, Presley's situation was distinguished from

Zacchini's entire act formula in that "Elvis Presley is the product," and his visage has "a high market value."[54]

The other case which further defined on what grounds celebrities' heirs might claim the descendible right of publicity was Hicks v. Casablanca Records[55] in which the heirs of Agatha Christie challenged a fictionalized book and movie entitled "Agatha." A United States District Court took this opportunity to define the "exploitation" requirement set down in Factors. Mrs. Christie's heirs claimed that her assigning rights to her literary works and bequeathing similar rights in her will constituted exploitation. Defendants claimed that exploitation must take the form of merchandise as in the Factors case.[56] Parties claiming the descendible right of publicity, the Court said, must show that "decedent acted in such a way as to evidence his or her recognition of the extrinsic commercial value of his or her name or likeness, and manifested that recognition in some overt manner."[57] In this case, the Court said, the author entered into contracts for use of her name in connection with plays and movies based on her books and assigned and bequeathed rights of her works, thus establishing a right of publicity which survived her death and is transferable.[58]

In addition to this development, there have been several cases since Zacchini in which First Amendment protection claimed by books and movies has been upheld against plaintiffs' right of publicity. Not only is factual material used in biography protected,[59] but so is fiction as long as it is "clearly fictitious" and does not contain "deliberate falsification."[60] Plaintiffs in the Hicks case specifically claimed a right of publicity

and sought an injunction against distribution of the book and movie "Agatha" which portrayed the late mystery writer as an emotionally unstable woman who, during an eleven-day disappearance, engaged in a sinister plot to murder her husband's mistress.[61]

The United States District Court said that this case raised a novel question: "Whether the right of publicity attaches where the name or likeness is used in connection with a book or movie?" More than merchandise, the Court said, books and movies have been considered "vehicles through which ideas and opinions are disseminated and, as such, have enjoyed certain constitutional protections."[63] Under the circumstances, the Court decided the issue was important enough to warrant looking at judicial interpretations of the right to privacy to determine what limitatations--if any--should be placed on the right of publicity. Engrafted on the New York privacy statute, the Court pointed out, are exemptions for matters of news, history, biography and other factual subjects of public interest. "This court finds," the decision says, "that the same privileges and exemptions engrafted upon the privacy statute are engrafted upon the right of publicity."[64] Since "Agatha," however, is primarily conjecture, surmise and fiction with the exception of a few names and the fact of the eleven-day disappearance, the defendants could not avail themselves of any of the four stated exemptions. The Court, thus, decided to use a balancing test "between society's interest in the speech and the interest seeking to restrain it."[65]

> The absence or presence of deliberate falsifications or an attempt by a defendant to present the disputed events as true, determines whether the scales in this balancing process shall

tip in favor of or against protection of the speech at issue.[66]

Along with rejecting the right of publicity claims in Hicks, the Court also rejected plaintiffs' claims of unfair competition. They had made that claim on the grounds that using Mrs. Christie's name in connection with the book and movie would cause confusion to the effect that the movie had been authorized or even written by her. The Court said there was no proof of that.[67] The conclusion was cited by another United States District Court just two weeks later in a case in which something akin to the right of publicity was granted in an unfair competition action brought by the director of "Night of the Living Dead" against distributors of "Return of the Living Dead."[68] In this case, the Court determined that action of the defendants in representing their film as a sequel and in using the same promotional phrases, stylized lettering and photographic scenes as the plaintiff's film constituted false designation of origin and false description of goods or services in commerce. "Confusion has been created," the Court concluded, "which would cause irreparable injury to the plaintiff's reputation and to financial success of his sequel."[69]

While some media defendants, thus, have won cases on First Amendment grounds, others have lost in the balancing of the media's dissemination of information versus the celebrity's right of publicity. The most important cases in this category in light of precedent are Factors, Etc. v. Creative Card Co.[70] and Factors, Etc. v. Pro Arts, Inc.[71] in which courts granted injunctions against Presley posters on the grounds that they

were not newsworthy. The obvious comparison here is the New York Superior Court's denial of Pat Paulsen's suit against the company which issued the Paulsen "FOR PRESIDENT" poster.[72] While the Court in that case said the posters were protected as political commentary on Paulsen's 1968 mock presidential campaign, no such protection was afforded manufacturers of the Presley posters, although both courts cited the Paulsen case. The first decision said that while Paulsen's choice of the political arena made him newsworthy in the First Amendment sense, "there is no constitutional protection for selling posters of Elvis Presley as Elvis Presley."[73] The only reasoning offered in the second decision was that "we cannot accept Pro Arts contention that the legend 'In Memory. . .' placed its poster in the same category as one picturing a presidential candidate, albeit a mock candidate."[74] It could be argued that Presley's death a little more than a month before the first case was decided and about ten months prior to the second decision was more a newsworthy event than a presidential campaign initiated as a joke. On the other hand, if the posters' commercial purposes were the deciding factor in these cases, Paulsen could have been overturned by the decisions.

In the other case in which a media defendant's defense of newsworthiness was rejected, Muhammad Ali claimed violation of his right of publicity when Playgirl magazine published without his consent and solely for the purposes of trade a drawing of a nude boxer identified as "the Greatest" and recognizable as the plaintiff.[75] A United States District Court said there was "no informational or newsworthy dimension" to defendant's use of Ali's likeness and neither did his status as a public

personality preclude liability.[76] In this instance, the Court recognized an added dimension:

> Defendants appear not only to be usurping plaintiff's valuable right of publicity for themselves but may well be inflicting damage upon his marketable reputation.[77]

Ali, in other words, has the privilege of maintaining for himself and granting to others the right to profit from his name and likeness and of protecting the reputation associated with that name and likeness.

Summary and Conclusion

Since Zacchini v. Scripps-Howard in 1977, there have been few court cases dealing with the right of publicity, but the suits which have come to court have further defined the right in several ways. First, the existence, transferability and descendibility of the right of publicity have been reiterated, and courts have said that in order for the right to be descendible, a celebrity must have manifested a recognition of the commercial value of his or her name in an overt manner during his or her lifetime.[78] Second, a United States District Court has determined that in New York the same exemptions to invasion of privacy suits--news, history, biography and other factual subjects of public interest--attach to right of publicity. In the case of fictionalized material, a balancing test between speech and the interest seeking to restain it should be used, with the test resting on the presence or absence of deliberate falsification and attempts to represent false material as true.[79] Third, right of publicity interests may be pursued through actions for unfair competition

in cases where there has been false designation of origin and false description of goods or services in commerce.[80] Finally, media outside the mainstream, such as posters, may find it difficult to sustain a defense of newsworthiness. That same difficulty may be experienced by a medium which attempts to portray a celebrity in a questionable and unnewsworthy manner that may tend to harm the interest he has cultivated in his reputation.[81] Based on these developments, substantial restriction of freedom of expression does not seem to have materialized. Being denied the profits which rightfully belong to another or the opportunity to knowingly falsify information or to publish items such as nude illustrations are surely restrictions with which the media can live.

Right of publicity cases do, in the end, involve a delicate balancing process between the media's right to inform the public about newsworthy people and the celebrity's right to enjoy the fruits of his labors. In light of Zacchini, the wisest course may be to think less about the Supreme Court's entire-act formula and the subsequent debate on its merits and more about the Court's analogizing the case to copyright law. Copyright's fair use doctrine,[82] if applied consistently to right of publicity cases, offers a basis on which to strike a balance between the celebrity's interest and that of the public in widespread dissemination of information. Factors to be evaluated under the doctrine include:

--Purpose and character of use of the material. Purely commercial purposes could be taken into consideration here as well as the intent to disseminate newsworthy information.

--Nature of material. Here the courts could determine if the material was newsworthy.

--Amount and substantiality of work used. Rather than relying entirely on an entire-act formula, the courts here might determine if essential portions of a performer's act or his personality had been appropriated.

--Effect of work on market for copyrighted material. This consideration would come into play in determining damages, based either on injury to the plaintiff or profits reaped unfairly by the defendant. In cases such as Zacchini's where the balancing question is perhaps most difficult because of the tension between appropriating en entire act but for newsworthy purposes, proof of damages could become the deciding factor.[83]

Consistent use of these guidelines would protect both the interests of the public personalities claiming right of publicity and those of society in general as represented by the media.

FOOTNOTES

[1]Zacchini v. Scripps-Howard, 97 S.Ct. 2849 (1977).

[2]For details of the facts of the case, see the Supreme Court's decision and "Privacy, Appropriation, and the First Amendment: A Human Cannonball's Rather Rough Landing," 1977 Brigham Young University Law Review 579 (1977).

[3]Zacchini v. Scripps-Howard, 2856-7.

[4]Edward C. Nucci, "Invasion of Privacy and the First Amendment: Zacchini Makes the Press Pay," 39 University of Pittsburgh Law Review 561 (1978).

[5]"Privacy, Appropriation, and the First Amendment," 580.

[6]Gerald G. Ashdown, "Media Reporting and Privacy Claims: Decline in Constitutional Protection for the Press," 66 Kentucky Law Journal 797 (1977-78).

[7]Nucci, on 561 of his article cited above, says the case is "likely to be extended in ways that auger ill for the news media." Warren J. Ludlow talks of "an unworkable standard and a chilling effect on the media" in "Zacchini v. Scripps-Howard Broadcasting Co.: Media Appropriation, the First Amendment and State Regulation," 1977 Utah Law Review 828 (1977).

[8]"The Right to Privacy," 4 Harvard Law Review 193 (1890).

[9]"Privacy," 8 California Law Review 389 (1960).

[10]"Privacy, Appropriation and the First Amendment," 584.

[11]Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905). The Court refjected a New York decision three years earlier which said that recognition of any such right was the task of the legislature. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[12]"Privacy, Appropriation, and the First Amendment," 608.

[13]Grant v. Esquire, 367 F. Supp. 876 (S.D.N.Y. 1973).

[14]In Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. PSa. 1963), the Court recognized that public figures have a valuable property right in their names and images but denied basketball player plaintiff relief from use of his picture in beer ads.

[15]Ludlow, 819.

[16]"Privacy, Appropriation, and the First Amendment," 586.

[17]Haelen Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F. 2d 866 (2d Cir. 1953).

[18]In Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Sup. Ct. 72, 232 A.2d 458 (1967), the Court granted relief to golfers, saying it was unfair for a game company to commercialize upon their names, reputations and accomplishments. In a more recent case, Guy Lombardo was said to have a cause of action on the basis of appropriation against a car advertisement which used his "reputation" and "mental image or likeness as Mr. New Year's Eve." He was said to have carefully and painstakingly built a public personality which has a marketable status and in which he has a proprietary interest. Lombardo v. Doyle, Dane & Bernback, 2 Med. L. Rptr. 2321 (1977).

[19]Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D. N.Y. 1975). A permanent injunction was granted to the same defendants on the same merits without relitigation in Price v. Worldvision Enterprises 4 Med. L. Rptr. 1301 (S.D.N.Y. 1978).

[20]Lugosi v. Universal Pictures Co., 172 U.S.P.Q. 541, 551 Cal. Sup. Ct. 1972). Reversed 139 Cal. Rptr. 40.

[21]Fairfield v. American Photocopy Equipment Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955).

[22]Hogan v. A.S. Barnes & Co., Inc., 114 U.S.P.Q. 314 (Pa.C.P. 1957); Sinatra v. Goodyear Tire & Rubber Co., 435 F. 2d 711 (9th Cir. 1970).

[23]Paulsen v. Personality Posters, Inc., 59 Misc 2d 444, 299 N.Y.S. 2d 501 (Sup. Ct. 1968).

[24]Man v. Warner Brothers, Inc. 317 F. Supp. 50 (S.D.N.Y. 1970).

[25]Current Audio, Inc. v. RCA Corp., 337 N.Y.S. 2d 949 (Sup. Ct. 1972).

[26]Booth v. Curtis Publishing Co., 1 Med. L. Rptr. 1784 (N.Y. S.C. 1962); Namath v. Sports Illustrated, 1 Med. L. Rptr. 1843 (N.Y.S.C. 1975).

[27]Charles F. Harris, "Tort Law: Appropriation of a Performer's Act by the News Media--Is It Privileged?" 16 Washburn Law Journal 790 (1977).

[28]Zacchini v. Scripps-Howard, 2849.

[29]Ashdown, 792.

[30]No. 33, 713 slip op. (Ohio Ct. App., July 10, 1975).

[31]Ibid., A33.

[32]Ibid., A40.

[33]47 Ohio St. 2d 224, 231, 351 N.E. 2d 454, 459 (1976).

[34]87 S.Ct. 534 (1967).

[35]47 Ohio St. 2d at 232, 351 N.E. 2d at 460. Proving reckless disregard for the truth is, of course, inapplicable to the particular circumstances of this case since it deals with a true presentation of an entire act.

[36]Ibid., 235, 351 N.E. 2d at 461.

[37]Ibid.

[38]97 S.Ct. 2849, 2856-7.

[39]Ibid.

[40]Ibid., 2857.

[41]Ibid., 2856.

[42]Ibid. Ashdown points out at 789 that the question of who publicizes information can dictate the extent of distribution, with media having a far greater potential audience.

[43]In Footnote #12, the Court explains that if, on the other hand, it could be shown that a broadcast increased the value of a performance through enhancement of reputation, etc., plaintiff could not collect. Ashdown at 792 says that enhancementof reputation and increased public interest in an act in such cases is much more likely than pecuniary loss and that in this particular case, "any unjust enrichment seems to have fallen on Zacchini."

[44]Ibid., 2860. Courts have held that although news is published for profit, it is not considered a "trade purpose." Donahue v. Warner Bros. Pictures, 194 F.2d 6, 11-12, 21 (10th Cir. 1952).

[45]97 S.Ct. 2849, 2859.

[46]Ibid., 2860.

[47]These questions were raised by Ludlow, Ashdown, Nucci and others.

[48]Memphis Development Corp. v. Factors, Etc., 3 Med. L. Rptr. 2012, 2013 (W. Dis. Tenn. 1977).

[49]3 Med. L. Rptr. 1290 (S.D.N.Y. 1977).

[50]The last extension of the Presley-Parker agreement dated January 22, 1976, granted merchandizing rights to Parker for seven more years. Factors, Etc. v. Pro Arts, Inc., 4 Med. L. Rptr. 1144 (U.S. App.Ct., 2d Cir., 1978), cert denied.

[51]Factors, Etc. v. Creative Card Co., 1293. In Guglielmi v. Spelling Goldberg Productions, 2d Civil 49773 (Cal.Ct. App., 2d App. Dis., 1977), the Court made it clear that the right to exploit name and likeness is personal to an artist and if not exploited by him during his life, his name and likeness may be used by another without liability. The heir of Rudolph Valentino, thus, was left without recourse to claim the actor's right of publicity.

[52]Factors, Etc. v. Pro Arts, Inc., 1148.

[53]Memphis Development Corp. v. Factors, Etc., 2012.

[54]Factors, Etc. v. Creative Card Co., 1293.

[55]4 Med. L. Rptr. 1497 (S.D.N.Y. 1978).

[56]Ibid., 1498.

[57]Ibid.

[58]Ibid., 1497.

[59]Guglielmi v. Spelling Goldberg Productions, 49773, extended First Amendment protection to a biography of Rudolph Valentino.

[60]Hicks v. Casablanca Records, 1497. On the other hand, if a supposedly truthful biography is fictionalized without being so stipulated, courts have granted relief. Spahn v. Julian Messner, Inc., 18 N.Y. 2d 324, 221 N.E. 2d 543, 274 N.Y.S. 2d 877 (1966). In this case, the biography of a baseball player contained deliberate falsifications of events, manufactured dialogue and erroneous statistics and to decide for the defendant, the Court said, would be granting a literary license unnecessary to the protection of free speech.

[61]Hicks v. Casablanca Records, 1498.

[62]Ibid., 1499.

[63]Ibid.

[64]Ibid.

[65]Ibid., 1500.

[66]Ibid., 1501. The Court also noted that striking the balance any other way in this case would jeopardize the developing literary genre of fictionalized lives of deceased figures, such as Burr by Gore Vidal.

[67]Ibid., 1502.

[68]Dawn Associates v. Links, 4 Med. L. Rptr. 1642 (N. Dis. Ill. 1978).

[69]Ibid., 1642. Courts have found that unfair competition does not apply if the information in question was obtained from public sources and used only after plaintiff had disseminated it and no longer expected to generate revenue from further dissemination. NFL v. Governor of Delaware, 435 F. Supp. 1377 (1977). This case, in which the NFL sought an injunction barring New Jersey from conducting a lottery based on its games, was distinguished from Zacchini because the lottery was not appropriating actual NFL performances but just its schedules, scores and public popularity.

[70]Factors, Etc. v. Creative Card Co., 1290.

[71]Factors, Etc. v. Pro Arts, 1148.

[72]See page 4 of this article.

[73]Factors, Etc. v. Creative Card Co., 1294.

[74]Factors, Etc. v. Pro Arts, 1149.

[75]Ali v. Playgirl, 3 Med. L. Rptr. 2540 (S.D.N.Y. 1978).

[76]Ibid., 2542-3.

[77]Ibid., 2544.

[78]See pages 9-10 of this article.

[79]See pages 10-11.

[80]See page 12.

[81]See pages 12-13.

[82]Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed. 2d.

[83]Zacchini's attorney John G. Lancione has indicated in a letter dated April 12, 1979, that his client's attempt to recover damages will go forward on June 25, 1979.